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IN THE

Supreme Court of the United States

October Term, 1961

No. 406

ANNA J. MCDOWELL, *Petitioner*

v.

ABRAHAM A. RIBICOFF, Secretary of Health, Education and Welfare, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Anna J. McDowell prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on June 16, 1961.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on June 16, 1961. (App. p. 19). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Does the occupation of the office of executor for compensation by a person who is not a professional fiduciary, constitute the carrying on of a trade or business by that person in his individual capacity so as to render such compensation "net earnings from self-employment" for the purpose of coverage under the Social Security Act, where the estate itself is not carrying on a trade or business under the rule of *U. S. v. Pyne et al, Executors*, 313 U.S. 127, 61 S. Ct. 893?

2. Was it Congressional intent that the term "trade or business" under Section 162 of the Internal Revenue Code be defined more broadly for social security purposes than for income tax deduction purposes?

OPINIONS BELOW

The unreported decision of the referee of the Social Security Administration is printed in the Appendix for Appellant filed herewith, pp. 28a-33a. The unreported decision of the Appeals Council is printed in the Appendix for Appellant, pp. 34a-39a. The District Court handed down no opinion; its findings and conclusions are printed in the Appendix for Appellant, pp. 40a-43a. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 12, is still unreported.

STATUTES INVOLVED

The statutory provisions involved are:

Sections 211 (a) (b) and (c) of the Social Security Act, 42 U.S.C. 211 (a) (b) and (c), added to the Social Security Act by Sec. 104 (a) of the Social Security Act Amendments of 1950, c.809, 64 Stat. 477; Section 162 of the Internal Revenue Code [Section 23 (a) (1) of the 1939 Code], 26 U.S.C. 162. They are printed in Appendix A, *infra*, pp. 9, 10.

STATEMENT

The jurisdiction of the District Court was involved because a question arises under the Social Security Act which provides by Section 205 (g), 49 Stat. 620, 42 U.S.C. 405 (g) for review by such court of a final decision of the Secretary of Health, Education and Welfare.

The petitioner, Anna J. McDowell, applied for old-age insurance benefits, claiming entitlement by reason of $5,000 fees earned as sole executrix of her aunt's $123,284.05 estate, on which she had paid self-employment tax.[1] It is agreed that if these earnings constituted "net earnings from self-employment" within the meaning of Section 211 (a) of the Social Security Act, 42 U.S.C. 411 (a),[2] she would qualify for benefits. Her claim was denied by the Bureau of Old Age and Survivors Insurance of the Social

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[1] The assets were chiefly securities. Approximately one-half, after $18,448.55 estate taxes plus sundry minor charges, was left to others. Appointed by the Surrogate, petitioner's responsibility and personal liability were imposed on her office by law. The overt administrative "activities" as such are set forth in the opinion of the Court below (Appendix "B", *infra*, p. 12), lasted about 21 months, and were found by the Secretary to be not extensive. The fees were paid under the statutes of New Jersey providing for executors' commissions in part "with reference to their actual pains, trouble and risk." (N.J.S.A. 3A: 10-1, 2.) She paid self-employment tax under Secs. 1401 and 1402 of the Internal Revenue Code, 26 U.S.C. 1401, 1402, which tax and define self-employment income in the same terms as Section 211 of the Social Security Act (Appendix A *infra*, p. 9).

[2] Sections 211 (a), (b) and (c) of the Social Security Act, 42 U.S.C. 411 (a), (b) and (c), were added to that Act by the Social Security Act Amendments of 1950, c. 804, 64 Stat. 477. The applicable portions are printed in Appendix A *infra*, p. 9. In general, they define "net earnings from self-employment" for social security coverage purposes as income derived by an individual from any trade or business carried on by such individual, and further define the term "trade or business" as having the same meaning as when used in Section 162 of the Internal Revenue Code, (formerly Sec. 23 (a)(1) of the 1939 Code), 26 U.S.C. 162, (Appendix A, *infra*, p. 10).

Security Administration, Department of Health, Education and Welfare, on the ground that the commissions received were not earnings derived from carrying on a trade or business. After a hearing, a referee of the Social Security Administration (R. Appellant's Appendix pp. 28a-33a) reversed the Bureau's decision, on the authority of *Wallace v. Commissioner*, 101 Fed. 604 (C. A. 4—1939), which the referee concluded was not overruled by this Court's decision in *United States v. Pyne*, 313 U. S. 127, 61 S. Ct. 893 (1941). The Appeals Council of the Social Security Administration reviewed the referee's decision on its own motion and concluding that the cases on the question of whether a fiduciary is carrying on a trade or business were "most difficult to reconcile completely," reversed the referee (R. Appellant's App., pp. 34a-39a) on the basis of a subsequent ruling of the Internal Revenue Service (Rev. Rul. 58-5 Cum. Bull. 1958, p. 322) (Appendix "A," *infra*, p. 10). The Ruling provides certain criteria for determining whether the earnings of a non-professional fiduciary are net earnings from self-employment.

The District Court, upon cross-motions for summary judgment, reversed the decision of the Appeals Council and without opinion entered judgment in accordance with its finding that the petitioner in serving as executrix of the estate was engaged in a trade or business within the meaning of the Social Security Act (R. Appellant's App., pp. 40a-43a).

The Court below (Appendix B, *infra*, pp. 10-19) reversed the judgment of the District Court, stating that this Court has redefined the term "trade or business" since the *Wallace* decision, and that the criteria set forth in the Internal Revenue Ruling applied by the Secretary are fully supported by the statute and embody the governing principles in the case.

REASONS FOR GRANTING THE WRIT

1. It is believed that the Court below and the Internal Revenue Service whose Revenue Ruling 58-5 is approved by that Court have misinterpreted the scope of this Court's decision in *United States v. Pyne et al., Executors*, 313 U. S. 127, 61 S. Ct. 893 (1941), where the question was whether the estate per se was engaged in a trade or business for income tax deduction purposes. If this Court did not intend that decision to cover the instant situation, where the question is whether the individual who is filling the office of executor with its attendant responsibility and personal liability is himself engaged in a trade or business, then the decision of the Court below is directly in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Wallace v. Commissioner*, 101 F. 2d 604 (1939). The situation presented in the *Pyne* case arose in *Helvering v. Highland*, 124 F. 2d 556 (1942), where the Fourth Circuit correctly followed the *Pyne* rule. That the *Wallace* decision is still regarded as good law within that Circuit is shown by its more recent application to a social security case by a lower Court in *Marie P. Bayles v. Folsum*, 157 F. Supp. 866, D.C.N.D.W.Va. (1958).

2. The question is one of importance in the administration of the Social Security Act not only because the decision of the Court below, upholding the criteria of Revenue Ruling 58-5, eliminates from the coverage provisions of the Social Security Amendment Act of 1950 all executors, administrators and trustees of typical estates where the assets consist primarily of cash and listed securities. The definition of "trade or business" for the purposes of the Social Security Act as stated by the Court below, i.e.;

> that the phrase "trade or business" must refer to extensive activity over a substantial period of time during which the taxpayer holds himself out as selling goods or services

affects the application of the Act generally with respect to all self-employed persons whose services are of a casual, intermittent or temporary nature. It is in conflict with the principle pronounced by other Circuits that the Social Security Act should be liberally construed in favor of those seeking its benefits, all doubts of interpretation to be resolved in favor of coverage. The Seventh Circuit in *Carroll v. Social Security Board*, 128 F. 2d 876 (1942); the Fourth Circuit in *Harper v. Flemming*, 288 F. 2d 61 (1961); the Ninth Circuit in *Miller v. Burger*, 161 F. 2d 992 (1947); and *Ewing v. McLean*, 189 F. 2d 887 (1951).

3. Even if the *Wallace* case as an income tax deduction precedent is found no longer valid, the instant case presents the important new question of whether Section 162 of the Internal Revenue Code should be more broadly interpreted when incorporated by reference in Section 211 (c) of the Social Security Act and Section 1402 (c) of the Internal Revenue Code by the Social Security Amendment Act of 1950 than when construed for the purpose of allowing income tax deductions.

The Internal Revenue Service by its Rev. Rul. 58-5 has relied on criteria evolved by the income tax case law since the *Pyne* decision, defining "trade or business" under Section 162 of the Internal Revenue Code for tax deduction purposes (as would be shown by brief if this petition were granted).

Yet the Social Security Amendment Act of 1950 and the Senate Committee Report[3] both indicate that the term "net earnings from self-employment," although defined as income derived from any trade or business carried on by an individual within the meaning of Section 162 of the Internal Revenue Code, shall be more liberally construed. than when interpreted solely for income tax purposes.

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[3] Senate Report No. 1669, 1950 U. S. Code Cong. Serv., p. 3287, at p. 3299. The purpose and scope of the Act are set forth therein at pp. 3287, 3288.

For example, the Senate Finance Committee states:

> If the individual's net earnings from self-employment amounted to less than $400 in any year, he would pay no self-employment tax on such income and receive no credit toward old-age and survivors insurance benefits. Thus, collection of taxes from persons whose self-employment is of a casual nature would be avoided.

For further example, the Act provides in Section 203 (e) (3) (B) (i), 42 U.S.C. 403 (e) (3) (B) (i) (for purposes of *subsequent benefit reduction only*) for the treatment of "substantial" services with respect to any trade or business; there is no corresponding limitation for coverage purposes in the Act.

On the other hand, the Court below analyzes the income tax cases applied here thus:

> It would seem that casual fiduciary, one who administers only a few estates on behalf of relatives, who is a principal beneficiary of the estates that he manages, and who is also not required to perform substantial and extensive management activities does not carry on a "trade or business" within the purview of Section 162.

In construing a statute, this Court has stated that the Court must be guided by the purpose and policy of the law. *United States v. Shirey*, 359 U. S. 255, 79 S. Ct. 746 (1959). The purpose and policy of the Social Security Act indicate that the Act shall have wide application and therefore differ from those behind income tax deductions which depend upon legislative grace and can be allowed only as there is clear provision therefor. *Deputy v. duPont*, 308 U. S. 488, 493 (1940).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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